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In the Supreme Court of the United States

JOHN J. KANE REGIONAL CENTERS - GLEN HAZEL,
PETITIONER

v.

SARAH GRAMMER, AS ADMINISTRATRIX OF THE ESTATE
OF MELVINTEEN DANIELS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONER

As the Kane Center explained in the petition for a writ of certiorari, this case provides the Court with the opportunity to finally decide whether, in the absence of an express private right of action, Spending Clause legislation establishing requirements for federal-state cooperative programs can unambiguously confer "rights" enforceable by third-party beneficiaries under 42 U.S.C. § 1983. This Court's review is also warranted because of doctrinal confusion following *Gonzaga University v. Doe*, 536 U.S. 273 (2002), and because the lower court's ruling effectively federalizes the traditionally state-law realm of medical malpractice as it relates to publicly operated nursing facilities. Briefs of numerous *amici curiae*

have since been filed in support of the petition, further underscoring the national importance of the legal questions presented by this case.

As explained below, Ms. Grammer's brief in opposition provides no persuasive reason why the Court should deny plenary review of the legal questions presented by this case.

ARGUMENT

A. The First Question Presented Was Raised Below

In seeking to sow seeds of doubt as to whether this case provides an adequate vehicle to decide the first question presented, Ms. Grammer bases much of her brief in opposition on a faulty premise. According to Ms. Grammer, "[n]o issue of whether Congress has *the power*, when spending money, to create enforceable rights in third-party beneficiaries of its spending was raised below and therefore cannot be presented here." Br. in Opp. 3-4 (emphasis added; footnotes omitted). Ms. Grammer is absolutely correct; however, her argument mischaracterizes the first question presented.

The petition does not ask the Court to decide whether Congress has "the power" under the Spending Clause to confer "rights" on third-party beneficiaries of state-federal cooperative programs. Instead, the first question presented asks the Court to decide what language Congress must include in a Spending Clause statute to confer such "rights" following this Court's decision in *Gonzaga*. *See* Pet. i (framing first question as "[w]hether, in the absence of an express private right of action, Spending Clause legislation establishing requirements for federal-state cooperative programs can unambiguously confer 'rights'

enforceable by third-party beneficiaries under" § 1983). In other words, the first question presented is one of statutory construction: following *Gonzaga*, can a Spending Clause statute that does not contain an express private right of action unambiguously confer privately enforceable "rights" on third-party beneficiaries of state-federal programs? That question implicitly assumes that Congress has "the power" to confer such "rights" so long as Congress makes its intention abundantly clear through unmistakable statutory language, thereby putting state and local governments on notice of what exactly they are getting themselves into by accepting federal funds.

Framed properly as it was in the petition, there is no doubt that this question was raised below and is ripe for decision here. For example, Ms. Grammer relies heavily on the question presented as framed by the Kane Center's merits brief in the court below. *See* Br. in Opp. 3 n.2. In that brief, however, the Kane Center specifically asked the Third Circuit to decide whether the district court correctly held that Congress did not intend to "create a federal court personal injury cause of action" by enacting the Federal Nursing Home Reform Amendments (FNHRA), which "speak in terms of what [S]tates must do to receive federal funding" and do not "expressly create any such personal injury claims." Br. of Appellee at 1, *Grammer v. John J. Kane Reg'l Ctrs. – Glen Hazel*, No. 07-2358 (3d Cir. Sept. 24, 2007).

Furthermore, Ms. Grammer presents no reason why this case provides an inadequate vehicle for the Court to finally decide the contract-based argument raised by several members of this Court. *See* Pet. 21-

26. Among other things, the Kane Center's merits briefing in both the district court *and* the court of appeals highlighted this issue by quoting extensively from Justice Scalia's concurring opinion in *Blessing v. Freestone*, 520 U.S. 329 (1997), which was joined by Justice Kennedy. *See* Br. in Supp. of Mot. to Dismiss at 19 n.2, *Grammer v. John J. Kane Reg'l Ctrs. - Glen Hazel*, No. 2:06-CV-00781 (W.D. Pa. Aug. 8, 2006); Br. of Appellee at 16-17, *Grammer v. John J. Kane Reg'l Ctrs. – Glen Hazel*, No. 07-2358 (3d Cir. Sept. 24, 2007). The contract-based argument was also of interest to the Third Circuit, as reflected by the following colloquy between Circuit Judge D. Brooks Smith and counsel for the Kane Center:

> Q. This, by which I mean the Medicaid program, is effectively a program of cooperative federalism, in effect, isn't it?
>
> A. That's correct.
>
> Q. Between the United States and the States, and so if you analogize that relationship as essentially a contractual relationship between the Congress on behalf of the United States and the States, should that matter and should that kind of agreement between those parties have some impact on our analysis here?
>
> A. I think it does, Your Honor, that's entirely the point. In footnote two of appellee's brief, I quote a section that was put into the, I believe it was the *Blessing* case, by [Justice] Scalia who was just writing separately to sort of elucidate this, this principle and he was saying exactly that. . . .

Oral Arg. Recording at 00:22:59-00:23:56, *Grammer v. John J. Kane Reg'l Ctrs. - Glen Hazel*, No. 07-2358 (3d Cir. May 20, 2008).

Accordingly, the Court should reject Ms. Grammer's unfounded assertion that the first question presented was not raised below.

B. The First Question Presented Has Not Been Decided By This Court

Ms. Grammer also asserts that the first question presented—which she persists in mischaracterizing as one of "Congressional power"—has already been "asked and answered." Br. in Opp. 5. As Justices Scalia, Kennedy and Thomas have explained, however, the Court has done no such thing. *See Blessing*, 520 U.S. at 350 (Scalia, J., concurring, joined by Kennedy, J.) (explaining that, although previous decisions of the Court had "permitted beneficiaries of federal-state contracts to sue under § 1983," the contract-based argument had not been raised in proceedings before the Court); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring in judgment) (explaining that if the contract-based argument were raised, he would "give careful consideration to whether Spending Clause legislation can be enforced by third parties *in the absence of a private right of action*") (emphasis added).

Ms. Grammer nonetheless cites *Gonzaga* for the proposition that the first question presented has already been decided by this Court. Specifically, she quotes (Br. in Opp. 5) this Court's observation that "[p]laintiffs suing under § 1983 do not have the burden of showing an intent to create a private *remedy* because § 1983 generally supplies a *remedy* for the

vindication of rights secured by federal statutes." *Gonzaga*, 536 U.S. at 284 (emphases added). The first question presented, however, does not ask the Court to decide whether Congress must include a private *remedy* apart from § 1983 in order to make a Spending Clause statute establishing requirements for federal-state cooperative programs enforceable by third-party beneficiaries. Instead, the petition asks the Court to decide whether, in order to satisfy *Gonzaga*'s "unambiguously conferred right" standard, Congress must include an express private right of action so there can be no doubt that the statute confers individually enforceable "rights" on third-party beneficiaries.[1]

Ms. Grammer also mistakenly contends that the relevance of the contract-based argument identified by several members of this Court has "waned in light of continued re-application by this Court of doctrine finding that § 1983 does create" a cause of action to

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[1] For example, one possible standard would be that, if Congress intends to confer individually enforceable "rights" on third-party beneficiaries of cooperative federal-state programs that are enforceable under § 1983, Congress must include a clear statement in the statute itself along the lines of "this statute confers rights on third-party beneficiaries enforceable under 42 U.S.C. § 1983." If such a clear-statement rule were adopted, courts would no longer be forced to use a multi-factored test in a frustrating effort to discern what Congress truly intended, and state and local governments would know full well what they are getting themselves into by accepting federal funds. *Cf. Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). The responsibility for creating "rights" enforceable by § 1983 would thus be returned to its proper owner: Congress, not the courts.

enforce Spending Clause legislation. The two decisions on which she relies do no such thing.

City of Rancho Palos Verdes, California v. Abrams, 544 U.S. 113 (2005), involved a communications statute enacted under the Commerce Clause, not the Spending Clause. *See* 47 U.S.C. §§ 151, 332(c)(7). Furthermore, because of concessions made by the city in that case, this Court assumed for purposes of decision that the statute created "rights." *See* 544 U.S. at 120. The only question before the Court was whether the statute's detailed enforcement scheme reflected congressional intent to preclude resort to the § 1983 remedy. *See id.* at 120-21.

The other decision on which Ms. Grammer relies, *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), actually undercuts Ms. Grammer's contention that the relevance of the contract-based argument has "waned." *Jackson* held that Title IX of the Education Amendments of 1972 created an implied right of action for retaliation against a male teacher who complained of sex discrimination by his school's athletic program. *See id.* at 171. Both the opinion for the Court and Justice Thomas's dissent recognized the continued relevance of the contract-based analogy when addressing Spending Clause legislation such as that at issue here. *Compare id.* at 182 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)), *with id.* at 190-91 (Thomas, J., dissenting) (same); *see also Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 296 (2006) (same).

Ms. Grammer's congressional-acquiescence argument fares no better. According to Ms. Grammer, the validity of the contract-based argument has been

"rendered suspect by long Congressional acquiescence in the *Blessing* [C]ourt's interpretation of § 1983." Br. in Opp. 7. However, even under the best of circumstances, legislative inaction is a slender reed upon which to lean. 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 49:10 at 140 (7th ed. 2008). That slender reed provides no support where, as here, the statutory interpretation in question was presented in a concurring opinion that flagged an issue for decision in a future case. Ms. Grammer's congressional-acquiescence argument would only make logical sense if the Court had expressly rejected the contract-based argument found in Justice Scalia's *Blessing* concurrence. Because the Court did not do so, Ms. Grammer's suggestion that congressional inaction following *Blessing* equals congressional disagreement with the contract-based argument makes no sense. As at least one commentator has acknowledged, the issue is still very much ripe for decision. *See* Lauren Saunders, *Are There Five Votes to Overrule Thiboutot?*, 40 Clearinghouse Rev. 380, 381 (2006) (advising counsel representing § 1983 plaintiffs not to petition for Supreme Court review because of this unresolved issue).[2]

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[2] Ms. Grammer also claims that the "absence of [an] ongoing dispute . . . is evident in *Gonzaga* from the question at issue, which was limited, in a fashion analogous to the second question presented here, to whether a particular statute created rights enforceable under § 1983." Br. in Opp. 6 n.6. She is mistaken. *See Gonzaga*, 536 U.S. at 277 n.1 (explaining that the Court denied review, not on a question similar to the first one presented here, but on whether the court below correctly

(continued)

The first question presented has not been asked and answered by this Court, and the contract-based argument's validity has not waned or been rendered suspect by subsequent decisions of this Court or by congressional acquiescence. Therefore, the Court should take this opportunity to finally decide these important issues of federal law.

C. The Second Question Presented Is Independently Worthy Of Plenary Review

The petition explained that the question whether FNHRA creates individually enforceable "rights" is independently worthy of plenary review because, among other things, the lower court's ruling effectively federalizes the traditionally state-law realm of medical malpractice as it relates to nursing facilities. Pet. 29-32. Ms. Grammer responds to this argument by accusing the Kane Center of overstating the scope of the lower court's ruling and by downplaying the number of facilities impacted. That effort fails.

According to Ms. Grammer, the petition wrongfully asserted that the decision below would federalize medical malpractice as it relates to government-operated "'*medical* facilities.'" Br. in Opp. 11-12 (purporting to quote Pet. 31) (emphasis added). Ms. Grammer's argument is based on words that never appear in the petition. Instead, the petition accurately quoted the statements of Ms. Grammer's own counsel for the proposition that the majority decision federalizes medical malpractice as it relates to gov-

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held that a private university and its officials acted under color of state law).

ernment-operated *nursing* facilities. *See* Pet. 21, 29-31.

Ms. Grammer also seeks to downplay the number of facilities impacted by the decision below. There are "only" 974 government-operated nursing facilities in the United States, according to Ms. Grammer. Br. in Opp. 12 n.10. Ms. Grammer neglects to mention that these "few" government-operated nursing facilities provide care to over 160,000 residents. Centers for Medicare & Medicaid Services, *Nursing Home Data Compendium* 29 (2008). Given their dependence on taxpayer dollars, these "few" facilities are particularly ill-equipped to handle a wave of malpractice litigation in federal court disguised as civil rights litigation.

Apart from misquoting the petition and seeking unsuccessfully to downplay the number of nursing facilities impacted by the lower court's ruling, Ms. Grammer never contests the actual substance of the petition's argument that the decision below federalizes medical malpractice as it relates to government-operated nursing facilities, choosing instead to raise an irrelevant preemption issue.[3] Nor does she chal-

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[3] According to Ms. Grammer, "[n]othing in FNHRA or [§ 1983] pre-empts state medical malpractice law." Br. in Opp. 12. While correct, Ms. Grammer's preemption argument disregards the means by which FNHRA has been used in an effort to federalize medical malpractice related to public *and* private nursing facilities. *See* Oral Arg. Recording at 00:13:15-00:13:35 (statement of Ms. Grammer's counsel, explaining: "As we routinely do in a situation like this where the defendant-home is a Medicaid beneficiary, we rely upon the violations of these federal provisions in the Medicaid Act to serve as a basis for, not

(continued)

lenge the petition's assertion (Pet. 31-32) that the ruling below substantially impacts privately operated nursing facilities as well.

Ms. Grammer characterizes the Third Circuit's ruling as a "faithful application of well-settled doctrine of this Court." Br. in Opp. 13. As supposed proof, Ms. Grammer quotes a lengthy passage from the Third Circuit's decision in which the majority discussed portions of this Court's § 1983 jurisprudence. *See id.* at 13-14. However, Ms. Grammer never addresses the Third Circuit majority's *own* reluctance in reaching the conclusion that FNHRA creates "rights" that are enforceable under § 1983. As explained by the petition (Pet. 17), the majority's reluctance was based on the fact that these supposed "rights" are derived from a statute specifying the contents of agreements between States and the Secretary of Health and Human Services, the latter of which may suspend payments to States if they fail to "comply substantially" with the Medicaid Act's requirements. As the panel majority explained: "These provisions gave us pause in [*Sabree ex rel. Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004)], and they continue to cause us some reticence today." Pet. App. 23a. The majority's reticence is well-deserved in light of the views expressed by several members of this Court. *See Blessing*, 520 U.S. at 350 (Scalia, J., concurring, joined by Kennedy, J.); *Walsh*, 538 U.S. at 683 (Thomas, J., concurring in judgment); *Sabree*, 367 F.3d at 194 (Alito, J., concurring); *see also Suter v. Artist M.*, 503 U.S. 347, 360 (1992) (finding that

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only the standard of care, . . . but also negligence *per se* for their violation.").

Spending Clause statute, which used a similar state-plan scheme, did not create "rights" enforceable under § 1983).

In addition, Ms. Grammer never addresses the dissenting opinion below (Pet. App. 25a-28a), nor does she answer the petition's assertion that, as recognized by the district court and the dissenting opinion below, "courts overwhelmingly have refused to find an implied right of action within FNHRA." Pet. 32. Like the Third Circuit, Ms. Grammer also never addresses FNHRA's comprehensive enforcement scheme. As explained in detail by the petition (Pet. 7-10), FNHRA's comprehensive enforcement scheme does not condition a nursing facility's receipt of Medicaid payments from a State on perfect compliance with FNHRA, nor does it condition a State's receipt of federal matching funds for its payments to such facilities on those facilities' perfect compliance with FNHRA. By allowing individual Medicaid beneficiaries to enforce the supposed "rights" created by FNHRA, however, the lower court's ruling imposes a strict-liability statutory tort scheme that Congress never intended.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari and the briefs of *amici*, the petition should be granted and the judgment of the Third Circuit reversed.

Respectfully submitted.

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